T.P.C. (M.W.)

v.

A.B.U. & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL APPEAL NO. 1 OF 1983]
23 FEBRUARY 1983

FAMILY LAW: *Adoption order - Section 10(1) Adoption Act 1952 - Jurisdiction - Whether applicants "ordinarily resident" - Section 4(3) - Whether consent dispensed with - Section 5.*

CIVIL PROCEDURE: *Appeal - Preliminary point - Whether appeal should be heard in camera - Right of appeal from adoption order - Sections 22, 25(6) - Revisionary powers.*

The respondents were husband and wife, both Australian nationals, living in Penang for more than three years prior to their petition for adoption but with intention of returning to Australia on the determination of the proceedings. They were in comfortable circumstances. The appellant claimed to be the paternal aunt of the boy, aged 7 years, whose father had been hanged for an offence of drug trafficking and whose mother was untraceable. She had contributed to the maintenance of the boy for some time. She was a widow with three children of her own and the boy's three-year-old sister. Before his execution, the natural father had given the appellant a signed document stating that he was leaving his children in her custody. An adoption order was made pursuant to the provisions of s. 10(1), Adoption Act 1952 (Revised 1981) ('the Act').

Held:

[1] The appeal must be heard in camera. [s. 10(2) of the Act; r. 12 of the Adoption Rules 1955].

[2] Welfare of the child is not the paramount and overriding consideration in adoption proceedings. [*Re H. Minor* [1982] 3 All ER 84, 92a.; *Re D. (an Infant) (Parent's Consent)* [1977] 1 All ER 145, 160.] The Court did not however wish to express any opinion regarding the merits of the application in view of its conclusions on certain fundamental legal questions and the order it proposed to make.

[3] No appeal lies from an order approving an application for adoption and the appeal must be dismissed *in limine*. [Sections 22 and 25(6) of the Act]. Appeals are creatures of statute and in the absence of express provision, no appeal lies. [*Benson v. N. Ireland Transport Board* [1942] AC 520, 535.]

[4] But the Court had powers to intervene by way of revision under ss. 33 and 35, Courts of Judicature Act 1964, should it consider the impugned order to have been made without jurisdiction.

[5] The adoption order was made without jurisdiction.

(a) The respondents had legal capacity to adopt

(i) They were "ordinarily resident" in West Malaysia when they made their application for adoption, and were therefore not debarred by s. 4(3) of the Act from applying for an adoption order. The words "ordinarily resident" must be construed in every case in accordance with the object and intent of the Act and

whether a person is "ordinarily resident" is a question of fact and means no more than that person, held to reside does so in the ordinary course of his life. [Section 4(4)(a) of the Act, *Re Bowie* [1880] XVI Ch. 484, at pp. 486, 487; *Inland Revenue Commissioners v. Lysaght* [1928] AC 217; *Reg. v. Barnet London Borough Council, Exp. Shah*, [1982] 1 QB 688.]

(ii) Section 4(1) of the Act must be construed as enabling even persons who are unrelated to the child to apply for adoption provided they can comply with the requirements of the Act. [*Gill v. Donald Humberstone & Co., Ltd.* [1963] 1 WLR 929, at p. 934; *Fry v. IRC* [1959] Ch. 86, 105.]

(b) However, the dispensation with consent to adoption under to proviso to s. 5 of the Act had not been complied with and therefore the adoption order must be quashed. The burden was on the proposed adoptors that consent ought to be dispensed with. The records must show that application had been made for dispensation and an order made dispensing with consent. The guardian *ad Litem's* report was not sufficient. As the aunt was also a "guardian" within the meaning of s. 2 of the Act, an order dispensing with her consent too must be produced. [*Practice Direction* [1961] 2 All ER 256; In *Re (R) an Infant* [1970] 1 QB 385; *Lady Teynham v. Lennard* [1724] 2 ER p. 204; *Re W. (an Infant)* [1971] 2 All ER 49; *Re H. (Infants)* [1977] 1 WLR 471.]

[6] The application for adoption must be remitted for re-hearing, the re-hearing to be in camera and to take the form of a witness action. [*Re D. (an infant) (Parent's Consent)* [1977] 1 All ER 145, 150g.]

[Application for adoption remitted for re-hearing in camera.]

Cases referred to:
Re H Minor [1982] 3 All ER 84
Re D (an Infant) (Parent's Consent) [1977] 1 All ER 145
Benson v. N. Ireland Transport Board [1942] AC 520
Re Bowie [1880] XVI Ch 484
Inland Revenue Commissioners v. Lysaght [1928] AC 217
Reg v. Barnet London Borough Council Exp Shah [1982] 1 QB 688
Gill v. Donald Humberstone & Co., Ltd. [1963] 1 WLR 929
Fry v. IRC [1959] Ch 86
Re (R) an Infant [1970] 1 QB 385
Lady Teynham v. Lennard [1724] 2 ER 204
Re W (an Infant) [1971] 2 All ER 49
Re H (Infant) [1977] 1 WLR 471

Legislation referred to:
Adoption Act 1952, ss. 2, 4, (1), (3), (1)(a), (4)(a), 5, (1), (1)(c), 6, 10(1), (2), 22, 25(6), 26(1)
Adoption Act 1958 [UK], s. 10
Adoption Rules 1955, r. 12
Courts of Judicature Act 1964, ss. 33, 35
Domestic & Appellate Proceedings (Restrictions of Publicity) Act 1968 [UK], s. 1

Other source referred to:
Practice Direction [1961] 2 All ER 49

For the appellant - Darshan Singh Khaira; M/s. Darshan Singh & Co.
For the respondents - W.A. Goh; M/s. Syarikat Goh Guan Ho

JUDGMENT

Edgar Joseph Jr J:

This is an appeal from an adoption order made by the President, Sessions Court, Penang, pursuant to the provisions of s. 10(1) of the **Adoption Act 1952,** (Revised 1981) ('the Act'), approving an application for adoption made by the respondents, in respect of a Chinese boy, aged 7 years ('the boy').

Should the appeal be heard in camera or in open Court?

A preliminary point which I had to determine was whether or not this appeal should be heard in camera or in open Court. Now adoption applications must be heard and determined the Chambers unless the Judge otherwise orders (r. 12 of the **Adoption Rules 1955)** ('the Rules'), and indeed s. 26(1) of the Act imposes restrictions, under pain of penalties, on advertisements indicating, *inter alia*, that a person is desirous of adopting a child. It would appear that in breach of this provision there have been ample reports in local Chinese newspapers of this application and the fact that this appeal has been brought. I was informed by Miss Goh for the respondents that a police report has been made regarding this and presumably investigations are in progress.

In England, appeals to the Court of Appeal, whether from the High Court or from a Country Court, and appeals to the High Court from a Magistrate's Court were formerly, as a rule, heard in open Court. By s. 1 of the **Domestic & Appellate Proceedings (Restriction of Publicity) Act 1968,** an Appeal Court may, on an application to it heard in private, in its discretion sit in private during the whole or part of a case in which the Court below could sit in private. However, unless there are good grounds (which must be stated in public) to the contrary, the Court's decision on the appeal and the reasons for it must be given publicly.

The position in this country is governed by s. 10 sub-section (2) of the Act which reads as follows:

> All proceedings of the Court shall be held in camera and all documents filed in the Court shall be confidential and shall be so kept by the Registrar.

And r. 12 of the Rules reads as follows:

> All documents filed in the Court shall be confidential and shall be kept secret by the Registrar. Every summons and every application shall be heard and determined in chambers unless the Judge shall otherwise order.

It is true that s. 10(2) of the Act refers to trials but, in my opinion, it should be applied by analogy to appeals as appeals are by way of rehearing and are continuations of trials. In any event, I fail to see any distinction in principle between the two in this context. I accordingly heard this appeal in Chambers.

The Facts:

The material facts, for purposes of this appeal, may be stated shortly. The respondents, both aged 46, are husband and wife, Australian nationals, have been living in Penang for more than three years prior to the presentation of the petition for adoption, the husband being a Chaplain on permanent commission and attached to the Royal Australian Air Force base at Butterworth. They intend returning to Australia, their country of domicile, as soon as these proceedings are finally determined. The wife is in fact a Penang born Chinese lady and prior to her marriage in 1962 was a teacher. They have three daughters of their own and an adopted

daughter whose ages range between 7 and 16. It is clear from the Report of the Welfare Officer, who incidentally, is also the duly appointed Guardian *ad Litem* of the boy, that in her opinion this is a stable family in comfortable circumstances.

Now, a few words about the boy. His natural father was hanged on 12 August 1982 following the substitution of the death sentence by the Federal Court for an offence of drug trafficking, and the Report of the Welfare Officer states that according to information, the natural mother had absconded and is untraceable. Until the boy was left in the care and possession of the respondents for purposes of compliance with s. 4(4) (a) of the Act, he was in the care of the local Salvation Army Boys Home, and the appellant, who claims she is his paternal aunt, contributed a monthly sum of RM40, later reduced to RM30, towards his upkeep. She is a widow, working as a cook at St. Xavier's Institution, Penang, and has three children of her own. She also has in her care the boy's sister who is aged three. Whilst the natural father was awaiting execution he gave her a signed document stating that he was leaving his children in her custody.

Whether welfare of the child is the paramount consideration?

Before the Sessions Court, both parties were represented, and based entirely on affidavit evidence, the President approved the application for adoption being guided by the principle that the paramount and overriding consideration was the welfare of the child. With respect, this is not the correct approach. Welfare is not the paramount and overriding consideration as it is in wardship, guardianship or custody proceedings: [*Re H. Minor* [1982] 3 All ER 84]. Paramount consideration in this context means consideration outweighing all others. However, in adoption applications, welfare of the child is certainly the consideration that outweighs any other: [per Lord Simon in *Re D. (an Infant) (Parent's Consent)* [1977] 1 All ER 145, 160]. In s. 6 of the Act it is placed second of three matters which the Court has to be satisfied about before making an adoption order. The first being that every person whose consent is necessary and whose consent is not dispensed with has consented and the third being that neither the applicant nor the parent or guardian has received or any other person made or given or agreed to make or give the applicant any payment or reward in consideration of the adoption.

In view of the conclusions I have reached regarding certain fundamental legal questions in this appeal and the order I propose making I do not wish to express any opinion regarding the merits of this application for adoption.

I shall now consider the first of these questions.

Does an appeal lie from an order approving an application for adoption under the Act.

It is elementary that appeals are creatures of statute and that in the absence of express provision, no appeal lies. If any authority is needed for this proposition then I would refer to the case of *Benson v. N. Ireland Transport Board* [1942] AC 520 535 per Viscount Simon.

In England s. 10 of the **Adoption Act 1958,** provided as follows:

> Where, on an application made in England to a magistrates' Court, the Court makes or refuses to make an adoption order, an appeal shall lie to the High Court.

In this country, ss. 22 and 25(6) of the Act provide as follows:

> 22. An appeal shall lie to the Federal Court or to the High Court from any refusal of the High Court or a Sessions Court, as the case may be, to make an interim order or an adoption order.

25. ...

(6) Where an adoption order is quashed, or an appeal against an adoption order allowed, the Court which made the order shall give directions to the Registrar-General to cancel any marking of an entry in the Registers of Births and any entry in the Adopted Children Register which was effected in pursuance of the order.

It is true that s. 25(6) suggests that appeals do lie against orders approving an application for adoption. In my view, however, this subsection merely confers powers on the Court concerned to make consequential orders addressed to the Registrar-General of Births & Deaths whereas s. 22 is a specific provision which gives the right of appeal and there being an apparent conflict between the two provisions, the latter overrides the former.

I therefore hold that as the impugned order was one approving an application for adoption, no appeal lies. The appeal is therefore dismissed *in limine*.

That however does not conclude the matter because I consider that I have ample powers to intervene by way of revision under the provisions of ss. 33 and 35 of the **Courts of Judicature Act, 1964,** should I consider that the impugned order was made without jurisdiction.

I therefore turn to consider the next question which requires determination.

Was the order approving the application for adoption made without jurisdiction?

I approach this question bearing in mind that it would be wholly wrong to use "the statutory guillotine" in the form of the Act to extinguish the rights of a natural parent unless I am satisfied that the conditions precedent appearing in ss. 4 to 6 of the Act have been strictly complied with.

I next ask myself two subsidiary questions which, in my view, fall to be considered, so far as this part of the case is concerned, namely,

(a) Have the respondents legal capacity to adopt regard being had to the restrictions on the making of adoption orders imposed by the Act?

The first restriction which requires consideration in this case would appear to be s. 4(3) of the Act which reads as follows:

(3) An adoption order shall not be made in favour of any applicant who is not ordinarily resident in West Malaysia or in respect of any child who is not so resident.

The question which requires determination is therefore whether at the material time, that is to say, at the date of the making of the application for adoption, the respondents were ordinarily resident in West Malaysia.

In construing the words "ordinarily resident" I think I should keep in mind the salutary advice of James, LJ in *Re Bowie* [1880] XVI Ch 484, at pp. 486, 487, namely,

...There are cases in which it has been judicially decided, and I think rightly, that the words "residence" and 'business' have no actual definite technical meaning, but that you must construe them in every case in accordance with the object and intent of the Act in which they occur...

The next point I should like to make is whether or not a person is ordinarily resident is a question of fact: *Inland Revenue Commissioners v. Lysaght* [1928] AC 217. In recent years, the purposive approach in the construction of statutes has found favour with the Courts in England [see, for example, *Reg. v. Barnet London Borough Council, Exp. Shah* [1982] 1 QB 688], and this is the approach I propose to adopt in this case.

I have already mentioned in passing the brief facts and what I now have to determine is whether on those facts, it could be said that the respondents were ordinarily resident in West Malaysia when they made their application for adoption.

I think the meaning of the words "ordinarily resident," in s. 4(3) of the Act is coloured by the provision of s. 4(4)(a) which read as follows:

> (4) An adoption order shall not be made in respect of any child unless
>
> (a) the child has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order;

This period of a care and possession is meant as a trial period or probationary period for the growth of mutual familiarity and is, in my opinion, sufficiently complied with if the applicant has been living in this country with the child sought to be adopted for the period of three months immediately preceding the making of the order.

It is also significant that the Court is *functus officio* once an adoption order is made because an adopted child does not become a ward of the Court and should the adoptive parents choose to remove the child out of the jurisdiction, the Court is powerless to intervene or to order any follow up proceedings to ensure that all is well with the adopted child. So I see no point in requiring an applicant to prove that he intends to reside permanently in this country. In my view, ordinary residence as opposed to occasional or temporary residence means no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life: [per Lord Buckmaster in *Inland Revenue Commissioners v. Lysaght* (*supra*)]. So the stay in this country has to be of sufficient duration and continuity to satisfy the requirement of ordinariness.

Looking at the problem in this way one can envisage two extreme situations which can readily afford a solution to the problem of whether the applicant is ordinarily resident. Take the case of an applicant who has a home here and works here as an ordinary member of the community. In such a case, I should have no difficulty in holding that he is ordinarily resident in this country. On the other hand, take the case of someone who is here on holiday, in other words, who is merely present in this country for a very limited and transient purpose. Clearly, such a person could not qualify as someone who is ordinarily resident in this country. However, between these two extreme examples we have cases falling within a grey area which give rise to problems the solution to which is not free from difficulty, and I venture to suggest that the matter now before me is such a case.

There is no doubt that the applicant must be physically present in this country when the order is made. But he must go further and show that he is actually living in this country and has a base here where his work is though he does not intend to live here permanently. However, he need not show that he has no immediate intention of residing anywhere else. I would accordingly answer the question raised in the affirmative and hold that the respondents were, at the material time, ordinarily resident in this country and were therefore not debarred by virtue of s. 4(3) of the Act from applying for an adoption order. I confess however that I have arrived at this conclusion after some hesitation as in my view this is a borderline case.

The second restriction which requires consideration would appear to be s. 4(1) of the Act which reads as follows:

> An adoption order shall not be made unless the applicant or, in the case of a joint application, one of the applicants -

(a) has attained the age of twenty-five and is at least twenty-one years older than the child in respect of whom the application is made unless the Court is satisfied that there are special circumstances for the making of an order;

(b) has attained the age of twenty-one and is a relative of the child; or

(c) is the mother or father of the child.

It was submitted that by reason of the provisions of this sub-section only parents or relatives of a child are competent to apply for adoption of that child.

It was stressed that the absence of the word "or" immediately after s. 4(1)(a) led to the inevitable conclusion that this was so. With respect I cannot agree. I consider that the interpretation contended for by Counsel for the appellant does great violence to the express language of the subsection and is particularly unjustifiable in the context of adoption legislation. In any event, such an interpretation would lead to the alarming consequence that an orphan without relatives could not be legally adopted. It follows that even if there is an ambiguity in the section (and I find there is none) I would construe it as enabling persons who are unrelated to the child to apply for adoption provided of course they can comply with the requirements of the Act. As was said by Lord Reid in *Gill v. Donald Humberstone & Co., Ltd.* [1963] 1 WLR 929, at p. 934:

> If the language is capable of more than one interpretation, we ought to discard the more natural meaning if it leads to an unreasonable result, and adopt that interpretation which leads to a reasonably practicable result.

And this is what Romer, LJ said in *Fry v. IRC* [1959] Ch. 86, 105:

> the Court ... when faced with two possible constructions of legislative language, is entitled to look to the results of adopting each of the alternatives respectively in its quest for the true intention of Parliament.

As to question (b):

(b) Were the requirements as to dispensation with consent to adoption under the provisions of the proviso to s. 5 of the Act complied with?

The record provided does not show that any application was made for dispensation of the consent of the natural mother as required under the provisions of the proviso to s. 5 of the Act, as it undoubtedly should have, and it is in fact plain that no such order was made.

I think I should say a few words about applications for dispensation of consent. The provisions of the proviso to s. 5(1), so far as they are material to this case, are these:

> provided that the Court may dispense with any consent required by this section if **satisfied**
>
> (a) ...
>
> (b) ...
>
> (c) in any case that the person whose consent is required **cannot be found** or is incapable of giving consent or that his consent is **unreasonably withheld**;...
>
> (Emphasis supplied)

I fail to see how a Court can be so **satisfied** in the absence of an application in due form for dispensation of consent supported by affidavit to which should be exhibited a statement or statements containing legally admissible and relevant evidence that the parent or guardian concerned cannot be found or is incapable of giving consent or that his or her consent is unreasonably withheld: [see ***Practice Direction*** [1961] 2 All ER 256].

Now, in this case, all we have is a hearsay statement, not on oath, contained in the Report of the Guardian *ad Litem*, which is as follows: "According to information, the natural mother has been away and cannot be found." Even the source of the information is not mentioned. I hasten to add that in dealing with this topic the Guardian *ad Litem* was acting very properly as it was her duty (unless otherwise directed) to take steps to inform the parent or guardian of this application to dispense with his or her consent and of the date for the hearing of the application and to send him or her a copy of the statement or statements of evidence lodged by the applicant in support of the application.

In my view, even if the Guardian *ad Litem's* report did not suffer from the defects I have mentioned, it could on no account be a substitute for necessary evidence to support an application for dispensation of parental consent. The burden will be on the proposed adoptors to show that consent ought to be dispensed with. Where, as here, it is alleged that the natural mother is untraceable, the Court must insist that all reasonable steps to trace her have been taken. In *Re (R.) an Infant* [1970] 1 QB 385, a possible intermediary who was a relative had not been approached for the parent's address, an appeal was allowed. I would suggest that the Registration Office, the Immigration Department, Private Detective Agencies, perhaps, even the Police, and the Daily Newspapers are examples of sources from which information can be obtained about allegedly missing persons.

In my opinion, therefore, on this ground the adoption order must be quashed.

I would however add that I do not agree with Mr. Darshan Singh, Counsel for the appellant, that his client is a person "liable to contribute" within the meaning of s. 5(1) of the Act since she is not legally liable to contribute to the boy's support. But I think he is right, on the authority of *Lady Teynham v. Lennard* [1724] 2 ER. p. 204, that the effect of the document signed by the natural father stating that he was leaving the children in the appellant's custody was to constitute her the guardian of the boy within the meaning of s. 2 of the Act which defines guardian as meaning any person or body of persons other than its natural parents who has custody of the child. It follows, therefore, that at the re-hearing, it will also be necessary for the respondents to obtain an order dispensing with her consent on the ground that her consent is being unreasonably withheld (s. 5(1)(c) of the Act), if they are to succeed in obtaining an order approving their application for adoption. In considering whether or not to dispense with her consent on the ground that it is being unreasonably withheld the Court will apply an objective test [*Re W. (an Infant)* [1971] 2 All ER 49]. In this context the welfare of the child is of great importance and has increased in importance over the years: [cf per Ormrod, LJ in *Re H. (Infants)* [1977] 1 WLR 471].

In the circumstances, and for the reasons already stated, I would remit the application for adoption for re-hearing before another President of the Sessions Court. Costs of this appeal will be costs in the cause. I further direct that the re-hearing which will be in camera, should take the form of a witness action so that there may be a full opportunity for cross-examination as apart from considerations of credibility the elements of character and personality are a vital basis for a decision in cases such as this: [*Re D. (an infant) (Parent's Consent)* [1977] 1 All ER 145, 150g].

Also found at [1983] 1 CLJ 330